No. 87-1610

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

JACK DYKSTRA FORD, INCORPORATED,
Petitioner,

VS

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

PETITIONER'S REPLY BRIEF

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STATEMENT

In its Brief, Respondent does not respond to the "Questions Presented" in Petitioner's Petition, and thus leaves unanswered Petitioner's arguments and legal authorities cited with regard to those substantive legal issues dispositive of this case.

Respondent submits that the only question before the Court is whether or not the Court of Appeals "*abused its discretion*" when it denied permission for an interlocutory appeal pursuant to 28 USC Sec. 1292 (b). Accepting, for purposes of this Reply Brief, that this *is* the sole issue, Petitioner's response to Respondent's claim that "Petitioner never asserts, let alone demonstrates, that the Court of Appeals' Decision not to permit an appeal was an abuse of discretion", is as follows.

ARGUMENT

If an adversary's arguments on the substantive, dispositve legal issues before the Court are telling, extremely troublesome, and essentially unanswerable, it is often best to ignore them, and argue something else, in the *hope* that—since they can't be effectively counter-acted—the Court will ignore them too. Respondent's cavalier treatment of the basic legal issue before the Court, by putting its sole, factually and legally unsupported, short-shrift reference to it, in a footnote at the very end of its Brief, is a classic example of this technique, to attempt to ignore into non-existence an issue which it knows it cannot win. In that footnote, Respondent failed to deal with the undisputed *fact* that, since the EEOC was "*in privity*" with the MDCR, the "Full Faith and Credit Act" (28 USC Sec. 1738), [as interpreted by this Court in: *Kremer v Chemical Construction Corp.*, 456 US 461 (1982) (pages 113a-114a,

Petition); the Michigan cases and other legal authorities cited at pages 10, 22-23, Petition; and, by the EEOC's own binding Rule expressly prohibiting the suit in question (Appendix Item #24, page 76a, Petition)], required the dismissal of the Complaint giving rise to this cause, pursuant to Petitioner's Motion seeking such dismissal.

Viewed realistically, Respondent's silence in this regard is tantamount to a concession by Respondent on the important Federal question involved, which constitutes the gross miscarriage of justice in this significant, heavily-trafficked area of the Federal law dealing with anti-job discrimination, that renders the refusal of the Court of Appeals to "hear the case", correct the injustice done, and give necessary, clear guidance to trial bench and bar, *a clear abuse of its discretion.*

Of course Petitioner claims that the Court of Appeals committed a gross abuse of its discretion; and, for Respondent to take the position that such a challenge is not made in the Petition before this Court is to "strain out the gnat, and swallow the camel". The reason that the Decision of the Court of Appeals, refusing to grant the appeal, is "clearly erroneous", is that such denial constituted a clear "abuse of (clearly erroneous use of its) discretion". Respondent's contention that the Petition has not challenged the Court of Appeals' Order, as constituting an abuse of its discretion, simply founders on the facts, and any fair and honest reading of the Petition (especially pages 26-28), since the entire Petition subsumes the claim that the Court of Appeals abused its discretion for all of the reasons set forth in the Petition.

Without so much as a single suggestion as to what the accepted *criteria* are for deciding whether or not a Court of Appeals has abused its discretion in such a case, Respondent simply states that—in its perhaps somewhat self-interested opinion—no such abuse occurred. "Discretion" in this context, as in most others, does not give a

court the "unbridled license to do as it pleases", so that whatever it does is, *ipso facto*, not an "abuse of discretion". The term "discretion" means:

> "... a 'sound judicial discretion' ". *Brookdale Cemetery Ass'n v Lewis*, 342 Mich 14, 18; 69 NW 2d 176 (1955)
>
> * * *
>
> "... 'sound discretion ... means in good faith and upon reasonable grounds' ". *People v Raider*, 256 Mich 131; 239 NW 387 (1931)

Therefore, there must be recognized criteria, against which to measure a court's exercise of discretion, to determine whether or not it is sound, judicial judgment, based upon facts, in compliance with consistently-applied legal principles, and not merely arbitrary, whimsical and capricious.

Respondent alludes to no such criteria, but uses its opinion, approving what the Court of Appeals did, as the ultimate measure of whether or not an abuse of discretion occurred. On the other hand, in the specific factors set forth in the "Conclusion" portion of its Petition (pages 26-28, Petition) Petitioner referred to the various criteria articulated in other Decisions of this Court, as to the kind of case, where a gross miscarriage of justice has occurred, and the issues involved are of such significant national concern, that this Court will act, by either deciding those issues itself, or by directing the Court of Appeals to hear the case and decide such issues. This case is an appropriate vehicle for determining what the law should be in this extremely important area. The particular issue is ripe for review, without regard to any factual presentation that might be developed in the trial court. And, it is clear that the EEOC, and Courts of Appeals, need the guiding light of the Supreme Court—not merely to resolve the unfairness here—to correct the unfairness that is likely to be repeated in other cases, since the EEOC feels itself totally

free to ignore its own Rule, the Federal Full Faith and Credit Act and the Decision in *Kremer*, supra.

The criteria that this Court has referred to in other cases, to determine such abuse of discretion issue, may fairly be listed in the following manner, as applied to the specific facts of this case.

1. A gross unfairness and miscarriage of justice, has occurred:

A. If Petitioner has to go to the tremendous additional financial burden to proceed to trial, that Petitioner's uncontradicted Affidavit shows is likely to bankrupt the corporation (Appendix Item #25, pages 78a-81a, Petition);

B. And, has to proceed to a trial over ten years after-the-fact, with key witnesses gone, and gaps in the memories of those witnesses who are still available, thus rendering Petitioner incapable of effectively defending itself, after other trial, and appellate courts have, on three separate occasions, *dismissed the claim*, here resurrected for yet a fourth attack upon Petitioner.

2. There is a single, clear, legal issue, which is dispositive of the case, that involves the interpretation and application of a Federal statute of constitutional derivation, which has already been interpreted and applied by the Supreme Court, in *Kremer*, supra., but which the EEOC, the Federal District Court, and the Court of Appeals felt free to ignore in this case.

3. The interpretation and application of this Federal statute arises in an important area of employment discrimination law where broad national policy needs to be clearly established and defined.

4. Where Federal trial courts, courts of appeals, and this court, are repeatedly involved, on almost a daily basis, to determine under what circumstances the termination, by dismissal, of an earlier, identical job discrimination claim in state court, is a bar to a later action in a Federal court.

5. Despite the guidance of the Court in *Kremer*, supra., apparently the Federal Agency charged with pursuing Federal job discrimination claims, and the lower courts, need an even clearer statement of the rule, so as to substantially reduce such suits in Federal District Court, and their appearances, in various appeals, in front of the Federal Courts of Appeal, and this Court.

The two cases cited by Respondent in its Brief, do not support it's position, and, in fact, furnish good authority for *granting* the Petition now before this Court. The Decision in *Tidewater Oil Co. v United States*, 409 US 151 (1972), is not at all relevant to the facts and circumstances of this case, since the decision of the Court of Appeals there, on the interlocutory order in question, which the Court of Appeals denied a Petition for permission to appeal from:

> ". . . would essentially be only an *advisory opinion* to the district court since the issue would usually be open to relitigation on appeal of the final judgment to this Court. The net result would be added work for the courts of appeals, with no assurance that there would ultimately be saving of district court time.
>
> Hence, we conclude that Sec. 1292 (b) did not establish jurisdiction in the Court of Appeals over interlocutory orders in Expediting Act cases. The exclusive nature of the juridiction created in Section 2 of the Expediting Act has consistently been recognized by this court, and we hold today that that exclusivity remains unimpaired." ID, pp 173-174.

In this case, the lower court clearly *had* jurisdiction.

The footnote, 50, to which Respondent refers merely notes the discretion of the Court of Appeals, with regard to a Petition under Sec. 1292 (b); and, refers to the fact

that, since the granting of such an appeal in the kind of case in question there would not "materially advance the ultimate termination of the litigation"—since it would only be an "advisory opinion" for a later appeal directly to the Supreme Court—to use such discretion to grant such appeals in that kind of case, would only cause added work for the courts, without any benefit to anyone resulting therefrom. Nothing could be further removed from the facts and circumstances of the case at bar, where a decision by the Court of Appeals on the issue presented would be ultimately dispositive of the case, and end the litigaiton once and for all.

The reasons expressed by this Court in the *Tidewater Oil* case, supra., for approving the discretionary denial there, give rise to the strong implication that *if* those circumstances were different—as they so strikingly are here—a different result might very well have obtained there. This case presents the starkly opposite picture, i.e., where an important Federal question is involved, of great national significance, in a type of case repeatedly brought before this Court, and where clear guidance now given should not only correct the injustice in this case, but substantially reduce the flood of cases of this sort that are being improperly filed, and then brought, on appeal, before the courts of appeals, and this Court. [It is interesting to note that the very next footnote appearing in the *Tidewater Oil* case, supra., is one where Justice Douglas quotes Mr. Chief Justice Hughes, who was wont to say, "Footnotes do not really count".]

In *Nixon v Fitzgerald*, 457 US 731 (1982), we find support for a finding that the Court of Appeals here was guilty of an abuse of discretion, and for directing it to proceed with a fully reasoned disposition of the issue raised on appeal. In *Nixon*, supra., this Court ruled that there was a "[c]ase in the court of appeals", even though the Court of Appeals had summarily dismissed the appeal to it from the District Court. In doing so, the Court relied

upon the "collateral order" doctrine of *Cohen v Beneficial Industrial Loan Corp.*, 337 US 541 (1949). Respondent contends that "since the only issue" presented is whether the Court of Appeals abused its discretion in refusing to permit the appeal requested here, that the underlying issue as to whether the EEOC's action is barred, may not properly be considered by this Court. It is ingenuous, to say the least, to argue that it is beyond the jurisdiction of this Court to look to the underlying legal issue, which the Court of Appeals would have dealt with, had it granted the Request for Permission to Appeal. This Court obviously has the jurisdiction, and authority, to look at the *entire case* to determine whether or not there has been such a clear violation of law in the District Court, that the Court of Appeals refusal to correct such clearly-erroneous Decision, causing a gross injustice, constitutes an abuse of discretion, under the criteria referred to above. This Court does not look at such a case in a factual and legal vacuum, nor, it is assumed, without regard to the matter of justice being done, by simply directing the Court of Appeals to grant the appeal and correct the error.

The very kind of injustice that the *Cohen* case, supra., held justified the granting of an appeal by the Court of Appeals, is very similar to that which confronts the Court here. There, the Court dealt with the requirement, in a state statute, that Plaintiff give security in order to pursue a particular type of litigation. The Federal District Court there determined that the statute did not apply, and did not require such security. The Court concluded that to wait for a final decision in the case would:

> ". . . be too late effectively to review the present order and the rights conferred by the statute, if it is applicable, will have been lost, probably irreparably."
> ID, p 546

In the case at hand, we have a similar practical reality, as referred to above, which is certainly no less worthy of consideration than that which motivated the Court there, and in the *Nixon* case, supra., to find that the Petition should be granted.

The kind of irreparable harm that will occur to Petitioner here, if not corrected, is no different from the kind involved in *Cohen*, supra., referred to there as:

> "important issue(s) completely separate from the merits of the action, and . . . effectively unreviewable on appeal from a final judgment."
> *Nixon*, supra., page 742.

CONCLUSION

What Petitioner asks is simply that this Court direct the Court of Appeals to listen to Petitioner's appeal *NOW*, to deal with this constantly recurring issue, in this significant area of Federal anti-employment discrimination law, so as to save potential future Defendants, and the Courts, from essentially frivolous suits, which are barred by prior final state court adjudications. Such action by the Court of Appeals, at this time, will also see to it that justice is done in this case, a matter which Petitioner assumes is still what courts of justice are all about.

The recognized criteria have been met, and disclose an abuse of discretion, that only the action of this Court, by granting this Petition, can correct.

Petitioner respectfully submits that the denial of its Petition would constitute the *extreme use* of an administrative policy, and procedural device to limit the work of the Court.

> "Extreme law is often extreme injustice".
> *Publius Terentius Afer*

> "[The] claimed right to 'sue til something gives' cannot be sound law. There must be an end of

> litigation, and out of shere self-defense in consideration of broad public policy our courts cannot gladly permit repeated litigation of the same old question under the circumstances appearing in this case."
> *Knowlton v City of Port Huron*, 355 Mich 448, 456; 95 NW 2d, 824 (1959)

To deny this Petition, in light of the clear error, and resulting injustice, would be to allow the Plaintiff, despite its privity, and identity of interest, with the MDCR, to "sue til something gives", i.e., Petitioner. The claim is barred. The EEOC had no right to file this action. To permit such clearly unlawful litigation to continue, merely to limit the work of the Court, cannot be sound law, and it certainly is not justice.

Petitioner respectfully requests that the Court grant the Petition,and direct the Court of Appeals to *GRANT* the *APPEAL*, and follow the mandate of *Kremer*, supra., by the dismissal, with appropriate sanctions, of this legally-barred action.

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